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In the  
**Supreme Court of the United States**  
October Term, 1997

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CITY OF MONTEREY,  
*Petitioner,*

v.

DEL MONTE DUNES AT MONTEREY, LTD., *et al.*,  
*Respondents.*

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On Writ of Certiorari to the United States Court of  
Appeals for the Ninth Circuit

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**BRIEF OF AMICI CURIAE PACIFIC  
LEGAL FOUNDATION AND THE BUILDING  
INDUSTRY ASSOCIATION OF WASHINGTON  
IN SUPPORT OF RESPONDENT**

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## QUESTIONS PRESENTED

1. In determining whether a government action denying the right to use property substantially advances a legitimate governmental interest, must a court take the government's word at face value or should it carefully weigh all the evidence presented by the parties?

2. When a government repeatedly denies the right to put real property to reasonable use, does a court have a duty to determine whether the government action substantially advances a legitimate governmental interest by examining the reasonableness of the relationship between the permit denials and any harms to the public health, safety, or welfare that might be caused by the use of the property?

3. Is a jury trial available in an action brought pursuant to 42 U.S.C. § 1983 seeking compensation for takings of private property?

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## INTEREST OF AMICI<sup>1</sup>

For 24 years Pacific Legal Foundation has been litigating in support of the right of individuals to make reasonable use of their private property. Pacific Legal Foundation attorneys have been before this Court on two occasions for the purpose of representing individuals whose right to use their property was unlawfully taken by government agencies. See *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997). It has participated as a friend of the court in virtually every major real property takings case that this Court has heard in the past two decades. Its attorneys are also counsel of record in four pending petitions for writ of certiorari that seek this Court's review of lower court decisions that have vitiated key components of the Takings Clause and this Court's decisions that have expounded upon the doctrine of regulatory takings. See *K & K Construction Company, Inc. v. Michigan Department of Natural Resources*, No. 97-1957 (filed June 4, 1998); *Bell v. City of Virginia Beach*, No. 97-2061 (filed June 22, 1998); *Lechuza Villas West v. California Coastal Commission*, No. 98-30 (filed June 30, 1998); and *Dodd v. Hood River County*, No. 98-54 (filed July 1, 1998).

The Building Industry Association of Washington (BIAW) is a trade association representing more than 7,700 members engaged in commercial and light industrial construction and the building of most of the residential housing in the State of Washington. Many of BIAW's members frequently make application to the government for approval of development projects. If the government is free to act to deny the right to

<sup>1</sup> Pursuant to Supreme Court Rule 37.6, amici curiae Pacific Legal Foundation and the Building Industry Association of Washington affirm that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

utilize real property without adequate judicial oversight the constitutional rights of members of BIAW will be harmed.

This amicus brief seeks to supplement the argument in respondent's brief by elucidating the manner in which the Takings Clause requires courts to evaluate regulatory actions that infringe upon the ability of persons to make reasonable use of their real property.

Pursuant to Supreme Court Rule 37, written permission from all parties for PLF to file this brief has been lodged with the Clerk of this Court.

#### STATEMENT OF THE CASE

There is no doubt that 37 acres of beachfront property in Monterey, California, even though some of it was once used as an industrial site, is extraordinarily valuable property. It is valuable in the ecological sense, as so much other beachfront property is already occupied by homes and visitor accommodations. It is valuable in the context of open space as the public increasingly chooses open space over new development. And it is valuable in the economic sense, as the desire by individuals to live along the coast remains unmet by the current supply of existing homes.

The City of Monterey (City) possesses permitting authority over the development of land within its jurisdiction. It also is the home to a vocal constituency that would prefer that no more homes be built in Monterey. It is only natural that when the City was faced with an application to develop 37 acres of property it was not going to rush headlong into the approval process. Monterey is sophisticated enough, however, to know that an outright denial of any and all use would raise certain Takings Clause problems. And as the permitting process continued over the years it became clear that while Monterey desired to use the property for its own purposes, it chose not to condemn the property and pay for it, preferring instead to delay the ultimate day of reckoning.

As has been recounted in the opinions below, beginning in 1981 Del Monte Dunes at Monterey, Ltd., and its predecessor in interest Ponderosa Homes, applied for permits to use its 37 acres. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1425 (9th Cir. 1996), Petitioner's Appendix (Pet. App.) at 3 (*Del Monte II*); *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1499 (9th Cir. 1990) (*Del Monte I*). While valuable, these 37 acres are not exactly pristine, once being the site of a petroleum tank farm. *Del Monte I*, 920 F.2d at 1499. Seven tank pads and an industrial complex remain on the property. *Id.* The first application was to build 344 residential units and was consistent with existing zoning. After the requisite environmental reviews, this was denied by the planning commission with the suggestion that a smaller 264 unit project would be favorably reviewed. *Id.* at 1502. That too was turned down, as were subsequent increasingly scaled back proposals of 224 and then 190 unit residential complexes, each having been developed at the suggestion of the City. *Id.*

Seeing a pattern developing, Del Monte Dunes realized that it was getting nowhere through the application route. Figuring that if the City wanted its property badly enough for open space it should pay for it, Del Monte Dunes sued. After an appeal and remand the case finally wound up back in federal district court where the court instructed the jury on whether "(1) all economically viable use of the property had been denied; or (2) whether the City's decision to reject Del Monte's development application did not substantially advance a legitimate public purpose." *Del Monte II*, Pet. App. at 5. The jury found that the City's actions took Del Monte's property and awarded Del Monte \$1.45 million.<sup>2</sup> The Court of Appeals for the Ninth Circuit affirmed.

<sup>2</sup> This amount was for a temporary taking of the property; the State of California purchased the property for \$4.5 million while the case was pending.

## SUMMARY OF ARGUMENT

Governments today are engaged in a broad array of functions, many of which can be facilitated by the use of private property. More often than not government must physically occupy or condemn property in order to achieve its goals, such as the acquisition of real property for a highway. But when government need not, as a practical matter, occupy or take title to property to achieve a legitimate end, then there is a temptation not to pay just compensation:

[R]egulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992).

When government regulations carry this risk of pressing private property into public service it is imperative that courts have the tools necessary to effect a meaningful review of the government action. It is true that courts should not second-guess a local or state government's purpose behind its decision to utilize property. Nevertheless, when determining whether the use of a particular parcel of property is appropriate, courts must employ something more than an "anything goes" standard of extreme deference. Instead courts should employ the "heightened scrutiny" utilized by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

In employing these standards in a takings analysis it must be recognized that both § 1983 and the Seventh Amendment grant property owners a right to trial by jury in inverse condemnation actions. Section 1983 provides a right to jury trial

because, as this Court has affirmed on numerous occasions, an action seeking money damages is an action at law. With respect to the Seventh Amendment, a thorough historical analysis reveals that trial by jury was the norm for condemnation actions in the late Eighteenth Century; and that protestations to the contrary are not based on any meaningful historical analysis. Finally, the fact-bound, ad hoc nature of takings claims, and the close analogy between such claims and actions for debt, makes the use of a jury appropriate for the resolution of *Del Monte Dune's* claims.

## ARGUMENT

### I

#### WHEN GOVERNMENT REGULATION THREATENS TO ELIMINATE THE ABILITY TO USE REAL PROPERTY IT IS IMPERATIVE THAT COURTS PROVIDE MEANINGFUL REVIEW OF THE REGULATORY ACTION

##### A. Because the Government Has the Practical Ability to Take Property Without Invoking Its Power of Eminent Domain, It Is Imperative That the Takings Clause be Effectively Enforced by the Courts

This Court recognizes the importance of private property. *See, e.g., Dolan v. City of Tigard*, 512 U.S. at 392 ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."). It is an integral element to any system of government that seeks to preserve all manifestations of liberty. *See, e.g., Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).<sup>3</sup> It is also axiomatic that

<sup>3</sup> In *Lynch* this Court wrote:

[t]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People

(continued...)

"while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Government today uses property for a much broader array of purposes than was contemplated in the early years of the republic. In the last century, for example, the primary use of property taken by the government was to support military and commerce purposes. See, e.g., *United States v. Russell*, 80 U.S. 623, 629-30 (1871) (compensation due for use of steamships during "rebellion"); *Head v. Amoskeag Manufacturing Co.*, 113 U.S. 9 (1885) (taking for mill); *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893) (taking of locks and dam); *Chicago, Burlington & Quincy Railway Co. v. Chicago*, 166 U.S. 226 (1897) (street extension and widening).

Starting in the late nineteenth century, however, the use by the national and state governments of the power of eminent domain has reflected the growing complexity and reach of government. Thus government has used its power of eminent domain to acquire property interests for everything from public parks, *Shoemaker v. United States*, 147 U.S. 282 (1893), to football teams, *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60, 68 (1982), to residential real estate, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (power used to redistribute real estate controlled by "oligopoly"), and even to Honolulu's recent controversial and questionable use of its eminent domain power to force owners of land under condominium apartment buildings

<sup>3</sup> (...continued)

have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.

*Id.* at 552.

to transfer their land to the condominium apartment owners, *Richardson v. City & County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), petition for writ of cert. filed sub. nom. *Small Landowners of Oahu v. City and County of Honolulu*, No. 97-1958 (June 3, 1998).

The power of eminent domain has thus been broadly applied. Governments have been increasingly willing to use the eminent domain power to further a growing range of public purposes, and the courts recognize the applicability of the Takings Clause to purposes beyond traditional acquisitions for projects related to the military or commerce. Nevertheless, there is still a reluctance by some government agencies to assume the fiscal responsibility of paying compensation when they take the use of private property.

Government today has focused its attention on environmental and "quality of life" issues to a degree that would have been unimaginable in the first century of the Nation's history. And to achieve its goals in furthering the environmental and quality of life objectives of modern society, government need not actually take title, occupy, or otherwise physically touch private property. But it often needs the *use* of private property for these ends just as much as it needs to physically take private property for ends that are related to building a transportation infrastructure or military preparedness. In the circumstance where government must use private property to achieve its ends, it is imperative that the rights of the owners are not ignored or given short shrift by the courts.

When building a highway government cannot hide the fact that it is taking property and has little choice but to exercise its power of eminent domain. Even when building a dam and thereby flooding private property the government cannot pretend that it has not taken the flooded property, although it might try. See *Pumpelly v. Green Bay & Mississippi Canal Company*, 80 U.S. 166 (1872). In the nineteenth century, as government began to utilize private property in more indirect ways than a

direct physical invasion, the doctrine of regulatory takings developed. Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 Utah L. Rev. 1211. This doctrine originated in the states and was, for a time, utilized to a certain extent by this Court in the latter part of the Nineteenth Century. *Id.* at 1265-76.<sup>4</sup> In this century the doctrine of regulatory takings was fully embraced by this Court in *Pennsylvania Coal*.

The development of the doctrine of regulatory takings was no doubt a judicial response to the expanding scope of governmental activity. When government is able to achieve its objectives by using private property in a way that does not require it to blatantly occupy or otherwise completely take over the use, possession, and title of real property, there is a certain temptation on the part of government to avoid its responsibility to the landowner. In other words, government might take the use or value of the property without the nicety of formally invoking its power of eminent domain. In this circumstance, what is the role of the courts?

**1. The Role of the Court Is Not to Second-Guess the Governmental Purpose Behind a Direct or Regulatory Taking**

That government has expanded its role in modern society is not an issue in this case and no party has suggested that it would be appropriate for this or any court to second-guess legislative decisions to tackle new societal concerns. In the context of land acquisition by government, this Court held in *Midkiff* that so long as there was a legitimate public purpose behind a condemnation action, the "public use" requirement of the Fifth Amendment would be satisfied:

<sup>4</sup> Kobach takes issue with suggestions that the doctrine of regulatory takings was never utilized by this Court until *Pennsylvania Coal Co. v. Mahon*, explaining instead that this Court first began to embrace the doctrine in *Yates v. Milwaukee*, 77 U.S. 497 (1870).

[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.

*Midkiff*, 467 U.S. at 241.

However, the deference granted to a legislative decision to tackle a particular problem with the tool of eminent domain does **not** extend to those government actions that take private property **without** paying just compensation. Thus, *Midkiff* held that a rational relationship to a conceivable public purpose will justify not any taking, but rather a "compensated" taking. 467 U.S. at 241. As the Ninth Circuit recognized in *Richardson*, "[t]he language used throughout *Midkiff* indicates that deference to the legislative body's public use determination is required when the taking is fully compensated." 124 F.3d at 1158. The *Richardson* court concluded that, under this Court's recent regulatory takings cases, reviewing courts should apply "heightened scrutiny when the taking is uncompensated, and a more deferential standard when the taking is fully compensated." *Id.*<sup>5</sup> This case does not involve a challenge to the ability of Monterey to regulate petitioner's property, to protect coastal viewsheds, or to preserve the habitat of Smith's Blue Butterfly. The City of Monterey's decision to protect these resources is not manifestly irrational and as such would deserve deference in a due process challenge. But this is not a due process challenge and is not even a challenge to a government's decision to exercise its power of eminent domain through a compensated taking.

<sup>5</sup> Some hold to the theory that a legislative decision to pay just compensation creates a presumption that a public purpose exists. See, e.g., Laurence Tribe, *American Constitutional Law Second Edition* at 589 (1988). Such a theory, however, may be inadequate in a regulatory arena dominated more by rent seeking than the public interest. See, for example, the facts in *Richardson*.

This is a regulatory *takings* case that challenges an *uncompensated* taking. The question here is whether a court must ~~and~~ provide meaningful review of the government's action. Must a court defer to a municipality's decision to apply its regulations to an individual's property in a manner that impacts the use and value of the property when the owner alleges that the purposes of the regulatory scheme are not advanced? As will be shown, the answer is no.

**2. A Government Regulation That Restricts the Use of Real Property Must Advance a Legitimate Governmental End, Otherwise the Regulation Could Result in an Uncompensated Taking**

In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), this Court recognized that there can be a taking when a regulation "does not substantially advance legitimate state interests or denies an owner economically viable use of his land." *Id.* at 260 (citations omitted).<sup>6</sup> In this case, the lower courts found there to be a taking because the application of the regulatory scheme to Del Monte's property did not advance any legitimate governmental interests. Thus, the first part of the *Agins* formulation is at issue in this appeal and in the context of this case it is clearly a takings formulation and not relevant to a due process theory.

The parallelism between the language of due process and the first part of the *Agins* takings formulation should not be taken as a sign that the *Agins* test is anything but a takings test

<sup>6</sup> This Court has unequivocally and repeatedly referred to the *Agins* two part test in analyzing the Takings Clause. See *Dolan*, 512 U.S. at 384; *Lucas*, 505 U.S. at 1015-16; *Pennell v. City of San Jose*, 485 U.S. 1, 19 (1988) (Scalia, J., concurring and dissenting); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Nollan v. California Coastal Commission*, 483 U.S. at 834 n.3; *United States v. Riverside Bayview Homes*, 474 U.S. 121, 126 (1985); *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 647 (1981) (Brennan, J., dissenting).

that, when placed before a court, deserves the heightened scrutiny that is appropriate in a takings analysis. In cases such as the present one, the legitimacy of the state interests is not in question. The regulatory goals here are arguably proper and fall squarely within the "otherwise proper" rubric of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (the Takings Clause "is designed . . . to secure compensation in the event of otherwise proper interference amounting to a taking").

The point of the first part of the *Agins* test is that when government interferes with the use and enjoyment of property in a way that does not achieve any legitimate governmental goals then the government has usurped, for all practical purposes, the incidents of ownership. A property owner, for example, is not required to provide a reason, legitimate or otherwise, to justify the owner's decision to put private property to a particular lawful use. Nor does the owner have to provide a reason for *not* putting property to a particular use. And so when government prohibits a landowner from putting property to a particular use, and when government cannot provide a legitimate reason for the prohibition—that is when it fails to substantially advance a legitimate governmental interest—then the government is acting in the manner of an owner. By restricting or prohibiting the use of private property without a valid justification, the government assumes the mantle of an owner—the government has become the owner. Thus the appropriateness of recognizing the first prong of the *Agins* test as a *takings* standard.<sup>7</sup>

<sup>7</sup> An early instance where this Court struck down a regulation as a taking because the government lacked the proper regulatory purpose occurred in *Delaware, Lackawana, & Western Railway Co. v. Morristown*, 276 U.S. 182, 195 (1928) ("the declaration of the ordinance that the specified part of the driveway 'is hereby designated . . . as [a] . . . hack stand' clearly transcends the power of regulation" and would be a taking). Some states have found takings based on the first part of the *Agins* test. See, e.g., *Seawall v. City of New York*, (continued...)

**3. In Order to Determine Whether the Prohibitory Application of a Regulation to a Property Interest Substantially Advances a Legitimate Governmental Interest, a Court Must Closely Examine the Relationship Between the Prohibition and the Goals Sought to be Achieved**

As noted above, this Court in *Nollan* observed that something more than the highly deferential standards of due process should apply when determining whether or not a government action "substantially advances" a "legitimate state interest." See 483 U.S. at 834 n.3. When the Court has employed this standard in a takings analysis, it has focused on the question whether the application of the regulation actually advances a legitimate governmental interest. Thus, in *Nollan*, the assumed otherwise proper state interest of protecting the viewshed from the obstacles created by the Nollans' new home was not advanced by a requirement that the Nollans allow people already on the public beaches to walk across their property. See *id.* at 838. In other words, the restriction imposed on the use of the Nollan's property lacked an "essential nexus" to the arguably legitimate governmental end. *Nollan*, 483 U.S. at 836-37.

In *Dolan v. City of Tigard*, 512 U.S. 374, this Court looked further at the nexus between the restriction on the use of Mrs. Dolan's property (the restriction being a refusal to grant her a permit unless she dedicated a greenway and built a bicycle path) and the state's asserted regulatory goals (relating to flooding and traffic congestion). Rejecting the "rational basis" or due process standard of review, this Court held that the City had failed to carry its burden of proving that a measure of "rough proportionality" existed between the regulatory

restriction and the government goal. 512 U.S. at 391.<sup>8</sup> By focusing on a need for an "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development," *id.*, this Court made it plain that it is necessary for a court to question whether a regulatory restriction imposed on the use of real property actually advances the regulatory goals involved.<sup>9</sup>

<sup>8</sup> Another instance where "proportionality" has been found relevant to a regulatory takings analysis occurred in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 645 (1993) (considering whether the takings plaintiff bore a burden "out of proportion to its experience with the [pension plan]"), *quoted in Eastern Enterprises v. Apfel*, No. 97-42, slip op. at 28 (June 25, 1998) (plurality opinion).

<sup>9</sup> The analysis of *Nollan* and *Dolan* applies to all regulatory takings, not just to those that involve a demand for an exaction in exchange for lifting a permit denial. Thus this Court in *Yee v. City of Escondido*, 503 U.S. 519 (1992), defined the existence of a *regulatory* taking to depend on "whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." *Id.* at 530 (citing *Nollan*, 483 U.S. at 834-35). Because this definition of a regulatory taking based on a nexus analysis is unrelated to any "exaction" demand, the focus in a nexus analysis must be on the harm caused by the proposed use of property and any regulatory response to that perceived harm. Whether that response be a permit denial or the imposition of a condition or exaction the analysis remains the same. That is because the ultimate goal underlying any takings inquiry is "to bar Government from forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The only practical way to effect this goal of the Fifth Amendment is for a court to look carefully at the burden imposed upon the landowner and compare it to any harm that the use of the land might cause.

<sup>7</sup> (...continued)

542 N.E.2d 1059 (N.Y. 1989) (regulation requiring payment of housing fee is a taking because it failed to substantially advance a legitimate governmental interest).

In the present case, the City of Monterey legitimately wanted to protect its environmental resources, its "flora and fauna," including the habitat of the Smith's Blue Butterfly, and the integrity of its General Plan. *Del Monte Dunes II*, Pet. App. at 17-19. In order to determine, however, whether the denials of Del Monte's permit applications actually advanced the legitimate governmental goals it is essential that a court undertake a critical inquiry of the alleged potential impacts from Del Monte's development proposals and ask whether the alleged impacts are (1) significant enough to warrant a denial and (2) whether a permit denial would actually protect the resources.

As the court below properly found, this sort of inquiry is "essentially factual" and depends on the "reasonableness" of the government action at issue. *Del Monte II*, Pet. App. at 15 (citations and quotations omitted).

**B. To Analyze Meaningfully Whether the Landowner Is Being Forced to Bear More Than the Owner's Fair Share to Achieve a Public Purpose, a Court Must Review the Facts of the Case Rather Than Always Deferring to the Government**

This case asks whether Del Monte's property was taken; not whether the City has the authority to take the property. In this situation the normal deference paid to an agency's decision to pay just compensation for property does not apply. As this Court has made plain, when the question is whether there is an uncompensated regulatory taking, a heightened level of scrutiny of the agency decision must apply:

[O]ur opinions do not establish that these [takings] standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the

State 'could rationally have decided' that the measure might achieve the State's objective."

*Nollan v. California Coastal Commission*, 483 U.S. at 834 n.3 (citations omitted, emphasis in original).

Is a landowner seeking a use permit from a government agency a mere supplicant seeking a government favor or is the owner *entitled* to make reasonable use of the property and therefore presumed to have the right of meaningful review if the permit is denied? In *Nollan*, this Court expressed the opinion that "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a "governmental benefit." *Nollan*, 483 U.S. at 833 n.2. Because the ability to use one's property is a right rather than a mere privilege it is critical that government agencies not interfere with that right unless necessary to protect public health and safety; and unless such interference avoids a "taking" of the property interest.

When government has the practical ability to achieve its goals by taking the use property without formally exercising its power of eminent domain, it is incumbent upon the courts to provide meaningful oversight. In a case such as the present one, when government is seeking to protect natural resource values, "by requiring land to be left substantially in its natural state—[the regulations] carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1018.

In the context of a permitting process, government has the ability to easily use its vast regulatory power to coopt the use of the property. It can exact onerous and unreasonable conditions in exchange for a permit. Or it can simply deny the permit outright thereby maintaining the status quo of open space or wildlife habitat. Thus this Court has well understood that when regulation of specific property is at stake, the overwhelming

power of the government must not be given carte blanche. If courts do not exercise some degree of heightened scrutiny of government actions that deny the ability to make reasonable use of property, the Takings Clause will be but little more than a mere curiosity.

As this Court warned in *Nollan*, the use of the permitting power to obtain public benefits unrelated to the purpose behind the use restriction would result in an inappropriate "leveraging of the police power." 483 U.S. 837 n.5. (use of permitting power to obtain beach path); accord *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 867-68 (use of permitting power to obtain money to build public tennis courts), *cert. denied*, 117 S. Ct. 299 (1996). In *Nollan* and *Ehrlich*, the courts carefully reviewed attempts to use the permitting power to obtain governmental benefits in the form of permit conditions. There is no logical reason, however, why the analysis should be any different if the government uses its permitting power and thereby obtains a desired benefit of open space, habitat, or simply the status quo use of real property by simply *denying* a permit. The Ninth Circuit was correct in holding the actions of the City of Monterey to a higher standard of review than one of extreme deference.

## II

### THE FACT-BOUND QUESTIONS OF "SUBSTANTIAL ADVANCEMENT" AND "ECONOMIC VIABILITY" WERE PROPERLY SUBMITTED TO A JURY

#### A. Both § 1983 and the Seventh Amendment Grant Del Monte the Right to a Trial by Jury in the Present Case

The judgment of the Ninth Circuit upholding the trial court's submission of the substantial advancement and economic viability questions to the jury should be affirmed. The statutory analysis employed by the unanimous Court in *Lorillard v. Pons*, 434 U.S. 575 (1978), strongly supports the conclusion that

42 U.S.C. § 1983 grants Del Monte a statutory right to a jury trial in the present case. Moreover, recent scholarship demonstrates that Del Monte also has a right to a jury trial under the Seventh Amendment. See Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144 (1996).

#### 1. Section 1983

The Ninth Circuit concluded that "Del Monte was entitled to have a jury try its inverse condemnation claim" asserted under § 1983. Pet. App. at 9. The major premise behind this conclusion was that "plaintiffs who bring an action *at law* under section 1983 have the right to a jury trial." Pet. App. at 7-8 (emphasis added). The minor premise was "Del Monte's inverse condemnation action is an 'action at law.'" Pet. App. at 9. As set forth below, both of these premises are correct.

Section 1983 authorizes a party who is injured by a constitutional violation committed under color of state law to bring "an action at law, suit in equity, or other proper proceeding for redress." These words derive, without change, from Section 1 of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13. Although the 1871 Act did not explicitly address the question of jury trials, *Lorillard* strongly suggests that the Forty-First Congress intended all actions "at law" brought under the Act to be decided by a jury if either party so desired it.

*Lorillard* presented "the question whether there is a right to a jury trial in private civil actions for lost wages under the Age Discrimination in Employment Act of 1967 [ADEA]," a question as to which the statute was silent (like the statute here). In seeking the intent of Congress with respect to jury trial, the Court began by finding "a significant indication of Congress' intent in its directive that the ADEA be enforced in accordance with the 'powers, remedies, and *procedures*' of the [Fair Labor Standards Act]," which had long been interpreted to provide a right to a jury trial in private enforcement actions. 434 U.S.

at 580. Similarly, Section 1 of the 1871 Act directed that procedural matters in actions brought under the Act were to be governed by the Civil Rights Act of 1866 and by "other remedial laws of the United States which are in their nature applicable in such cases." 17 Stat. at 13. Those other laws, as this Court observed in a case decided within months of the 1871 Act's passage, "secured the right to either party in a suit at common law to a trial by jury." *Kearney v. Case*, 79 U.S. (12 Wall.) 275, 281 (1871) (emphasis deleted).<sup>10</sup> As *Lorillard* teaches, the Forty-First Congress "can be presumed to have had knowledge" of those laws. 434 U.S. at 581. Accordingly, by directing that proceedings under the 1871 Act be governed by existing remedial statutes, "Congress dictated that the jury trial right then available [in suits at (common) law] would also be available in private actions [at (common) law] under the [1871 Act]." *Id.* at 582-83.

As *Lorillard* further teaches, "[t]his inference is buttressed by an examination of the language Congress chose to describe the available remedies under the [1871 Act]." *Id.* at 583. The Act, like § 1983 today, empowered an injured plaintiff to bring an "action at law" or a "suit in equity" to redress constitutional

<sup>10</sup> See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 77 (mandating that "the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury"); *id.* § 12, 1 Stat. at 80 (mandating that "the trial of issues in fact in the circuit courts shall, in all suits, except those of equity, and of admiralty, and maritime jurisdiction, be by jury"); *cf. id.* § 13, 1 Stat. at 81 (mandating that "the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury"). In 1874, these jury trial provisions were codified as §§ 566, 648, and 689, respectively, of the Revised Statutes. See *Revised Statutes of the United States* 97, 118, 128 (2d ed. 1878).

It is perhaps worth noting here that both Congress and this Court have used "at common law" and "at law" synonymously. See *Grant, supra*, at 175 n.127.

violations under color of state law. The phrase "at law," just like the word "legal" in the ADEA, was "a term of art." *Id.* From 1789 onwards, the "general rule" of federal procedure was that "the trial of issues of fact in actions at law, both in the district court and in the circuit court, 'shall be by jury.'" *Chappell v. United States*, 160 U.S. 499, 513 (1896); see also *Grant, supra*, at 168-73 (documenting the long-standing and deep-running distinction between actions "at (common) law" and suits "in equity"). Just as in *Lorillard*, therefore, "[w]e can infer . . . that by providing specifically for [redress 'at law'], Congress knew the significance of the term ['at law'], and intended that there would be a jury trial on demand to" redress constitutional violations under color of state law. 434 U.S. at 583.

It remains to consider whether Del Monte's lawsuit is an "action at law" within the meaning of the 1871 Act and now § 1983. We think this question is appropriately addressed with reference to this Court's analysis of condemnation actions. See *Grant, supra*, at 192-94. So framed, the question is an easy one, but it does not lead to the conclusion advanced by the City. As this Court has reaffirmed in numerous cases going back more than a century, a condemnation proceeding "is a suit at law, within the meaning of the constitution of the United States and the acts of congress conferring jurisdiction upon the courts of the United States." *Searl v. School District No. 2*, 124 U.S. 197, 199 (1888) (citing *Kohl v. United States*, 91 U.S. 367, 376 (1876)); see also, e.g., *Chappell*, 160 U.S. at 513 ("This proceeding for the condemnation of an interest in land . . . was, in substance and effect, an action at law." (citing *Kohl*, 91 U.S. 367)); *Metropolitan Railroad Co. v. District of Columbia*, 195 U.S. 322, 328 (1904) ("[T]he decisions of this court have settled that a condemnation proceeding . . . is, in its nature, an action at law" (citing *Kohl*, *Searl*, and *Chappell*)).

Because plaintiffs who bring an action at law under § 1983 have a statutory right to a jury trial, and because an action seeking compensation for the taking of private property is an

action at law, the Ninth Circuit correctly concluded that Del Monte was entitled to have a jury try its § 1983 claim.

## 2. The Seventh Amendment

The Seventh Amendment preserves the right to trial by jury “[i]n Suits at common law.” The City and its amici do not dispute that condemnation actions are suits at common law for purposes of the Amendment; this proposition is hardly controversial. See, e.g., *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission*, 430 U.S. 442, 458 (1977) (“Condemnation was a suit at common law . . .”); *Kohl*, 91 U.S. at 376 (“The right of eminent domain always was a right at common law.”); see generally *Grant*, *supra*, at 173-76 (exhaustively demonstrating this point). Rather, the City argues that *even so*, the Seventh Amendment does not guarantee a trial by jury in condemnation proceedings because there was “no common law right to jury [trial] in eminent domain proceedings.” Pet. Br. at 22. In this argument, the City invokes a principle long enunciated by this Court: “The Seventh Amendment was declaratory of the existing law, for it required only that jury trial in suits at common law was to be ‘preserved.’ It thus did not purport to require a jury trial where none was required before.” *Atlas Roofing*, 430 U.S. at 459.

It would be difficult to contest that this Court has, on several occasions, issued statements that appear to agree with the City’s historical assessment. For example, in *United States v. Reynolds*, 397 U.S. 14 (1970), the Court relied on Professor Moore’s assessment of “[t]he practice in England and in the colonies prior to the adoption in 1791 of the Seventh Amendment, [and] the position taken by Congress contemporaneously with, and subsequent to, the adoption of the Amendment” for its statement that “there is no constitutional right to a jury eminent domain proceedings.” *Id.* at 18; accord 8 James Wm. Moore, et al., *Moore’s Federal Practice* § 38.33[4][a], at 38-125 (3d ed. 1998) (asserting that “although eminent domain proceedings were traditionally suits at common law, a jury trial right did not

exist in such actions at common law”). Likewise, *Kohl* asserted that the right of eminent domain “was not enforced through the agency of a jury . . . for many civil as well as criminal proceedings at common law were without a jury.” 91 U.S. at 376.

One could fairly argue that most if not all of the Court’s statements in this regard constituted dictum, see *Grant*, *supra*, at 162-64, 174 & n.126, but we believe that the present case calls for a more fundamental approach to the issue. Simply put, the historical assertions regarding trial by jury in eminent domain proceedings that have issued from this Court, from other courts, and from commentators are *flatly, fundamentally, and unequivocally wrong*. Contrary to those assertions, the practice in England and the 14 United States at the time the Seventh Amendment was adopted demonstrates that a jury trial right *did* exist in such actions; at that time, the right of eminent domain *was* almost universally enforced through the agency of a jury.<sup>11</sup>

<sup>11</sup> The instant brief does not itself undertake the relevant historical analysis. When one eschews the “law office history” employed by all-too-many courts and commentators, that analysis is much too detailed to fit into a portion of an amicus curiae brief. For our conclusions, we rely primarily on the *Grant* article, which actually analyzes at length the “primary materials—the statutes of England and the fourteen states composing the United States when the Seventh Amendment was ratified in 1791.” *Grant*, *supra*, at 177; see also *id.* at 177-91 (conducting a historical examination of the jury’s role in eminent domain proceedings). Based on those materials, the article concludes that “in 1791, juries almost universally intervened in eminent domain proceedings to assess compensation.” *Id.* at 187; accord *id.* at 188 (“The historical evidence is overwhelming: one can only conclude that the Seventh Amendment ‘preserves’ the right of property owners to have a jury intervene at some point in eminent domain proceedings . . . , either as part of the proceeding by which the property is taken (condemnation) or in a separate proceeding subsequent to the taking (inverse condemnation).”).

The position taken by Congress contemporaneously with, and subsequent to, the adoption of the Amendment *confirms* these points.<sup>12</sup> Accordingly, in order truly to “preserve” the right to

<sup>11</sup> (...continued)

In this conclusion, the article joins other scholarship. See George E. Butler II, *Compensable Liberty: A Historical and Political Model of the Seventh Amendment Public Law Jury*, 1 Notre Dame J. L. Ethics & Pub. Pol’y 595, 670 (1985) (“[T]here was in 1791 the near universal right in England and the states to an *ad quod damnum* jury on the issue of damages in straight condemnation actions, available (if not in the first instance) at least on appeal from an unfavorable administrative award.”); Morton Horwitz, *The Transformation of American Law, 1780-1860*, at 84 (1977) (describing “an important institutional innovation that began to appear after 1830—an increasing tendency to state legislatures to eliminate the role of the jury in assessing damages for the taking of land”).

<sup>12</sup> Only the day before it sent the Seventh Amendment (and the rest of the Bill of Rights) to the states for ratification, the First Congress enacted the Judiciary Act of 1789. That Act, which “has always been considered, in relation to [the Constitution], as a contemporaneous exposition of the highest authority,” *Marshall v. United States*, 281 U.S. 276, 301 (1930), confirmed the constitutionally significant distinction between suits at common law and actions in equity (or admiralty). As to the former category, the First Congress provided that in every one of the new federal courts created by the Act (including even this Court), “the trials of issues in fact” shall “be by jury.” See note 10, *supra*; Grant, *supra*, at 168-70. There was no exception made for eminent domain proceedings.

It is no surprise, therefore, that when such proceedings began to be initiated in the federal courts with some regularity, juries regularly intervened. See, e.g., *Kohl*, 91 U.S. at 377 (affirming the judgment in a condemnation proceeding in which “the [circuit] court instructed the jury to find and return separately the value of the estates of the lessor and the lessees”); *Chappell v. United States*, 160 U.S. at 513-14 (affirming a jury verdict of \$3,500 for the property owner and holding generally that condemnation proceedings instituted in federal

(continued...)

trial by jury in suits at common law, this Court should acknowledge the heretofore unexamined historical record and accord property owners a jury trial in actions seeking just compensation in federal district court.<sup>13</sup>

Although we do not minimize the role of stare decisis, we submit there is ample precedent for the Court to reexamine and modestly revise its Seventh Amendment jurisprudence in light of the foregoing. In *United States v. Gaudin*, 515 U.S. 506, 519 (1995), also a case involving the constitutional right to trial by jury (albeit under the Sixth Amendment rather than the Seventh), a unanimous Court rejected the government’s argument that “the principle of *stare decisis* requires that we deny [respondent’s] constitutional claim.” Conceding that “we cannot hold for respondent today while still adhering to the reasoning and the holding of” *Sinclair v. United States*, 279 U.S. 263 (1929), the Court voted unanimously to “repudiate” that decision. *Gaudin*, 515 U.S. at 519. The Court observed that the role of stare decisis “is somewhat reduced . . . in the case of a procedural rule such as this, which does not serve as a guide to lawful behavior” and “is reduced all the more when the rule is not only procedural but rests upon an interpretation of the Constitution” *Id.* at 521. Obviously, the application of the Seventh Amendment to proceedings such as the one brought by

<sup>12</sup> (...continued)

court carry with them the right to trial by jury according to the “general rule” that first found expression in 1789—even when Congress had otherwise provided that the “forms and modes” of such proceedings conform to state practice).

<sup>13</sup> Because the present action was brought in a district court against a municipality rather than against the United States, it does not raise the added complications of sovereign immunity. Cf. Grant, *supra*, at 191-205 (demonstrating that, in light of *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. at 315-16 & n.9, the United States has no immunity from suits to recover just compensation pursuant to the Fifth Amendment).

Del Monte is likewise a procedural issue that rests upon an interpretation of the Constitution.

Moreover, "*stare decisis* cannot possibly be controlling when, in addition to those factors, the decision in question has been proved manifestly erroneous." *Id.* We submit that scholarship has proved the historical underpinnings of *Reynolds* and its ilk to be precisely this—manifestly erroneous. It would be one thing if the Court had issued even one opinion that actually undertook a historical analysis and reached a sober conclusion after having marshaled and weighed the evidence. Such an opinion, even if erroneous, might more legitimately be insulated by *stare decisis*. But the Court, to our knowledge, has never issued such an opinion: the historical "analysis" contained in *Reynolds* and similar opinions consists either of mere ipse dixit pronouncements unburdened by supporting evidence or of citations to commentators who themselves make pronouncements lacking any supporting citations to original materials. These deserve no insulation from reexamination.

Finally, we note that if many of the Court's casual statements that the Seventh Amendment does not require a jury in eminent domain proceedings are pure dictum, *see Grant, supra*, at 162-64, other such statements are manifestly inconsistent with the actual cases generating those statements. For instance, in the very same opinion pronouncing that eminent domain "was not enforced through the agency of a jury," the Court in *Kohl* ratified an eminent domain proceeding instituted by the United States in federal circuit court, a proceeding in which a jury had assessed the value of the property taken. 91 U.S. at 376, 377; *see also, e.g., Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. at 244 (holding that "the last clause of the seventh amendment forbids the retrial by this court of the facts tried by the jury in the present case"); *United States v. Jones*, 109 U.S. 513, 517-18 (1883) (upholding a jury verdict against the United States, a

verdict that had increased by 25% the award rendered by three commissioners).

In sum, the Court should reexamine its Seventh Amendment jurisprudence in light of the convincing demonstration that, in 1791, juries almost universally participated in eminent domain proceedings in England and the 14 United States. As in *Gaudin*, *stare decisis* should not stand in the way of setting aside the manifestly erroneous pronouncements of prior decisions, especially where the relevant issue is both procedural and constitutional, as it is here. For this reason, and for the additional statutory reasons discussed above, this Court should affirm that Del Monte had a right to a trial by jury on its claim against the City.<sup>14</sup>

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<sup>14</sup> The amicus curiae brief of the states argues that providing a jury trial in federal court would "interfere with state sovereignty" because "if a state fails to provide a jury trial on liability, it will be faced with the possibility of having to relitigate identical issues in federal court." Brief for the States of New Jersey, et al., as Amicus Curiae in Support of Petitioner (States Brief) at 9, 13 (capitalization altered). In the first place, any interference with state sovereignty would be a necessary consequence of the long-standing and "strong federal policy against allowing state rules to disrupt the judge-jury relationship in federal courts," a policy to which state sovereignty must yield. *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 538 (1958).

But more fundamentally, the premise of the states' argument is wholly false: assigning decision-making authority in federal cases to a jury rather than to a judge simply will not alter the preclusive effect of prior state court proceedings (whatever that effect might be). As this Court held in *Parklane Hosiery v. Shore*, 439 U.S. 322 (1974), "an equitable determination [by a nonjury factfinder] can have collateral-estoppel effect in a subsequent legal action" in which determinations would be made by a jury. *Id.* at 335 (emphasis added). The states acknowledge *Parklane Hosiery* but assert that *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990), cast doubt on the earlier decision, rendering "uncertain" the preclusive (continued...)

**B. A Jury Trial in an Inverse Condemnation Action Necessarily Includes a Jury Determination of the Facts That Determine Whether the Defendant Is Liable for a Taking**

Once it is established that Del Monte had a right to a jury trial on its inverse condemnation claim against the City, it is a relatively simple task to determine whether that right included the right to have a jury determine the essential factual elements of Del Monte's claim. In its recent decision in *Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384, 1389 (1996), this Court unanimously held that the question "whether a particular issue occurring within a jury trial . . . is itself necessarily a jury issue" turns on whether resolution of that issue by a jury is "essential to preserve the right to a jury's resolution of the ultimate dispute." The "ultimate dispute" with respect to Del Monte's inverse condemnation claim, as with any claim for money damages, is the existence and amount of the City's monetary liability to Del Monte. Cf. *Yasuda Fire & Marine Insurance Co. of Europe, Ltd. v. Continental Casualty Co.*,

<sup>14</sup> (...continued)

effect of juryless state court determinations in subsequent federal proceedings. See States Brief at 11-12. *Lytle* did nothing of the sort. Rather, *Lytle* explicitly reaffirmed the holding that "an equitable determination can have collateral-estoppel effect in a subsequent legal action." 494 U.S. at 550 (emphasis in original) (quoting *Parklane Hosiery*). *Lytle* then distinguished a subsequent legal action from a case that "involves one suit in which the plaintiff properly joined his legal and equitable claims." *Id.* at 553 (emphasis added). In the end, *Lytle* merely "decline[d] to extend" *Parklane Hosiery* and declined to accord collateral-estoppel effect to a very narrow category of factual determinations—"a district court's determinations of issues common to legal and equitable claims where the court resolved the equitable claims first solely because it erroneously dismissed the legal claims." That category is not even remotely implicated by a state proceeding followed by a subsequent federal one. State sovereignty is safe.

37 F.3d 345, 352 (7th Cir. 1994) (identifying "the ultimate dispute between the parties" as "the amount of money, if any, [one] owes [the other]"). By arguing that juries should not decide issues of substantial advancement or economic viability (or any other factual issues relating to whether a regulatory taking has occurred), the City essentially argues that the jury in the present case should have exercised *no role whatsoever* in determining the City's liability. That position simply cannot be squared with *Markman*'s insistence on "preserv[ing] the right to a jury's resolution of the ultimate dispute." 116 S. Ct. at 1389.

If any further analysis were required, it would merely confirm this conclusion. As *Markman* recounted, the Court has repeatedly stated that whether a particular issue is for the jury "must depend on whether the jury must shoulder this responsibility *as necessary to preserve the substance of the common-law right of trial by jury*." *Id.* at 1390 (internal quotation marks omitted, emphasis in original). It is difficult to conceive that the "substance" of the jury trial right could be preserved by a rule in which the jury is given *absolutely no say* regarding the defendant's liability. Moreover, the two means by which the court has attempted to "sharpen" this kind of analysis—"the distinction between substance and procedure" and "the line . . . between issues of fact and law"—both support the conclusion that the jury must be allowed to determine the factual elements of liability. *Id.* Can there be a matter more substantial and less procedural than whether the defendant is liable to the plaintiff? As for whether "substantial advancement" and "economic viability" are issues of fact or law, we cannot improve upon this Court's statement, most recently in *Lucas*, that a regulatory takings analysis consists of "essentially ad hoc, factual inquiries." 505 U.S. at 1015 (quoting *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978)). This is self-evidently true when the question is whether the application of a regulation *to a particular parcel of property* either fails to substantially advance a legitimate state interest

*with respect to that property* or deprives *that property* of economically viable use.

Finally, of course, there is the "historical method," the device of "comparing the modern practice [under review] to earlier ones whose allocation to court or jury we do know." *Markman*, 116 S. Ct. at 1390. Because "[a]n action for inverse condemnation based upon an alleged regulatory taking did not exist, as such, when the Seventh Amendment was adopted," Pet. Br. at 22, and because condemnation actions did not involve questions of liability, a historical analysis must look to an appropriate analog.<sup>15</sup> The City and its amici denigrate trespass as an appropriate analog but do not suggest an alternative. We, however, suggest that inverse condemnation is appropriately analogized to an action in debt, the "debt" arising from the government's duty to pay just compensation for an (asserted) taking of private property. The question whether the government has committed a taking, then, may be analogized to the question whether the government actually "owes" the debt—that is, whether the government is liable to the property owner. Under this analogy, the property owner's right to a jury trial undoubtedly encompasses the issue of liability, as this Court unanimously held in *Tull v. United States*, 481 U.S. 412 (1987). Having determined that the government's action seeking civil penalties under the Clean Water Act was "clearly analogous to

<sup>15</sup> This should not be taken as a concession that the jury's role in 1791-era condemnation proceedings was confined to assessing damages only. As the statutes collected in the Grant article indicate, juries often had greater roles. See Grant, *supra* at 221, 228, 236 (reprinting Connecticut, Massachusetts, and Rhode Island highway statutes, under which the jury assisted the court in determining whether to alter the course of a highway or discontinue it altogether); *id.* at 224 (reprinting Delaware mill statute, under which the jury was authorized to determine whether a mill dam, race, or pond was "so injurious [that it] ought not to continue"); *id.* at 233 (reprinting North Carolina highway statute, under which the jury had authority to determine the existence and courses of all public roads).

the 18th-century action in debt," the *Tull* Court concluded that "petitioner has a constitutional right to a jury trial to determine his *liability* on the [government's] claims." *Id.* at 420, 425 (emphasis added). So, too, Del Monte has a constitutional right to a jury trial to determine the City's liability on its claim for compensation for a taking of private property.

For all these reasons, the Ninth Circuit correctly upheld submission of the fact-bound questions of "substantial advancement" and "economic viability" to the jury.

### CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

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Respectfully submitted,

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